

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

CENTER FOR A SUSTAINABLE COAST and	*	
KAREN GRAINEY,	*	
	*	
Plaintiffs,	*	
	*	
v.	*	2:19-CV-58-LGW
	*	
U.S. ARMY CORPS OF ENGINEERS et al.;	*	
	*	
Defendants.	*	
	*	

Plaintiffs’ Supplemental Response to the Court’s Order (Dkt. No. 115)

After the parties filed cross-motions for summary judgment, this Court asked for supplemental briefs on three topics, including a topic relevant to the merits of plaintiffs’ NEPA claim. (Dkt. No. 91 at 2). When responding to this Court’s Order to confer on the next steps for this case to move forward, the parties overlooked that topic #2 in the Order for supplemental briefing was relevant to plaintiffs’ NEPA claim. If this Court reviews plaintiffs’ NEPA claim without further briefing, plaintiffs ask for the Court to consider the supplemental briefs on topic #2. (Dkt. Nos. 94 at 7-10 and 95 at 7-9).¹

¹ The Corps defendants did not want to file this as a joint response.

For that topic, this Court ordered the parties to file supplemental briefs addressing:

Whether the Army Corps of Engineers considered whether constructing the Lumar dock on Cumberland Island would violate the Seashore Act, 16 U.S.C. § 459i-5(b), such that the Corps duly considered whether the proposed dock would “threaten[] a violation of Federal . . . law . . . imposed for the protection of the environment,” 40 C.F.R. § 1508.27(b)(10) (2016), and therefore cause a “significant environmental effect” precluding the use of a categorical exclusion because of “extraordinary circumstances,” 40 C.F.R. § 1508.4 (2016).

40 C.F.R. § 1508.27 directs agencies to consider context and intensity when determining whether a proposed action’s effects are significant under NEPA.

40 C.F.R. § 1508.27(b) identifies factors that “should be considered in evaluating intensity.”

In its supplemental brief, the Corps claimed an “agency has no obligation to assess the factors set forth in 40 C.F.R. § 1508.27(b) when applying a categorical exclusion” because the agency previously found – when designating categories of actions as categorical exclusions – that the excluded actions “do not individually or cumulatively have a significant effect on the human environment” (Dkt. No. 94 at 7-8 *citing* 40 C.F.R. § 1508.4 (2016)). But the categorical exclusion here (a letter of permission) is not a discrete category of actions found to have no significant environmental impact. Before the Corps can issue a letter of permission, the

administrative record must support a finding that the proposed action “would not have significant individual or cumulative impacts on environmental values.” 33 CFR § 325.2(e)(1)(i). Determining whether the action may have significant impacts on environmental values under NEPA requires consideration of any relevant factors in 40 C.F.R. § 1508.27(b).

Plaintiffs request that this Court (a) reviews the supplemental briefs (Dkt. Nos. 94 at 7-10 and 95 at 7-9) and (b) considers the reason stated above as to why the Corps’ supplemental brief didn’t offer a rational basis for the agency’s failure to consider whether the dock threatened a violation of the Seashore Act.

Alternatively, plaintiffs propose that the parties be allowed to file responses to the supplemental briefs, topic #2.

Respectfully filed August 15, 2024.

/s/ Jon L. Schwartz

Jon L. Schwartz

Ga. Bar. No. 631038

Attorney for Plaintiffs Center for a Sustainable Coast and Karen Grainey

Jon L. Schwartz, Attorney at Law, P.C.

1100 Peachtree St., N.E., Suite 250

Atlanta, GA 30309

404-667-3047

jon@jonschwartz.net

Certificate of Service

I certify that I have this August 15, 2024, served this *Supplemental Response* upon all counsel of record by way of the Court's electronic case filing (ECF) system.

/s/ Jon L. Schwartz

Jon L. Schwartz

Ga. Bar. No. 631038

Attorney for Plaintiffs Center for a Sustainable Coast and Karen Graine

Jon L. Schwartz, Attorney at Law, P.C.

1100 Peachtree St., N.E., Suite 250

Atlanta, GA 30309

404-667-3047

jon@jonschwartz.net